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No. 90-1793

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AVON GROUP, INC.,

Petitioner,

—vs.—

STATE OF NEW YORK INSURANCE DEPARTMENT and WENDY E. COOPER, ACTING SUPERINTENDENT OF INSURANCE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for certiorari.

STATEMENT OF THE CASE

Petitioner commenced this action, seeking declaratory and injunctive relief, in the United States District Court for the Southern District of New York.[1] It alleged in its amended

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1 Petitioner's disclaimers of any request for injunctive relief are contradicted by the Record. In its amended complaint, petitioner ex-

complaint that the action was brought pursuant to the district court's admiralty jurisdiction. The Court is respectfully referred to the district court's opinion for a description of the nature of the action. *Avon Group, Inc. v. State of New York Insurance Dept.*, 741 F. Supp. 82 (S.D.N.Y. 1990). (Pet. A-20).

The district court dismissed the action on the ground that the Tax Injunction Act, 28 U.S.C. § 1341 (1988), deprived the court of jurisdiction to grant either injunctive relief, 741 F. Supp. at 83, or declaratory relief. *Id.* at 83 n.4. (*citing California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982).

On appeal to the United States Court of Appeals for the Second Circuit, the district court's judgment was summarily affirmed, substantially for the reasons stated by the district court. The court of appeals denied petitioner's petition for rehearing.

REASONS FOR DENYING THE WRIT

Petitioner asserts that the Tax Injunction Act is inapplicable because (1) the Act does not apply in admiralty cases, and (2) the Act does not apply to state taxes on foreign commerce. These arguments do not raise serious legal issues warranting review by this Court.

Petitioner's first argument, that the Tax Injunction Act does not apply in admiralty cases, is premised on the assumption that the amended complaint correctly invoked the district court's admiralty jurisdiction. Avon argues mechanically that the policies whose premiums are taxed by respondents are "ocean marine" policies, and that the subject matter of its

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pressly sought "[t]hat the defendants be restrained and enjoined from taking further proceedings within the New York Insurance Department against AVON GROUP, INC., as the Insurance Department . . . threatens tax assessments, penalties and interest. . . ." (Amended Complaint, Wherefore clause, ¶ 4.)

action is maritime. Thus, it concludes, this is a case involving admiralty law over which a federal court has jurisdiction. *See De Lovio v. Boit*, 7 Fed. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776) (Story, J.). Avon is wrong. Neither the subject matter of the controversy nor the relationship of the parties is maritime in nature. *See generally Exxon Corp. v. Central Gulf Lines, Inc.*, __ U.S. __, 59 U.S.L.W. 4571 (June 3, 1991). This is not a suit for breach of an ocean marine policy. Instead, it is a challenge to the exercise of the State's regulation of the procurement of such policies, and is far removed from any maritime concerns. *See infra* at 5.

Admiralty courts are constituted to try actions for damages arising from torts at sea or from marine contracts, *Berwind-White Coal Mining Co. v. City of New York*, 135 F.2d 443, 446 (2d Cir. 1943), *see* Jhirad, Sann, Chase & Chynsky, 1 *Benedict on Admiralty* § 106 (7th ed. 1985), not declaratory or injunctive relief challenges to State legislative actions. Moreover, Avon's invocation of the court's admiralty jurisdiction ignores that traditionally, admiralty courts had none of the powers of a court of equity, *The Eclipse*, 135 U.S. 599, 608 (1890); *United Transportation and Lighterage Co. v. New York & Baltimore Transp. Line*, 185 F. 386, 389-90 (2d Cir. 1911), and could not grant equitable relief even for the purpose of complete justice. *The Ada*, 250 F. 194, 195 (2d Cir. 1918); *cf. Swift & Co. Packers v. Campania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950); *Schoenamsgruber v. Hamburg Line*, 294 U.S. 454, 457-58 (1935).

Avon cites no case in which an admiralty court has granted declaratory and injunctive relief from a tax. To the contrary, in *Sipe v. Amerada Hess Corp.*, 689 F.2d 396 (3d Cir. 1982), the Third Circuit held that the Tax Injunction Act barred a federal court challenge brought by seamen to the application to them of a New Jersey unemployment compensation tax. Indeed, an admiralty court sitting prior to the enactment of the Tax Injunction Act found that it lacked the jurisdiction to grant injunctive relief from a tax statute. *Streckfus Steamers v. Mayor and Board of Alderman*, 10 F. Supp. 529 (S.D. Miss. 1935), *aff'd*, 81 F.2d 298 (5th Cir. 1936).

Moreover, contrary to Avon's contention, a limitation of a district court's jurisdiction, such as the Tax Injunction Act, does not even arguably infringe the Article III grant of admiralty jurisdiction unless it exceeds the limits established by this Court in *Panama Ry. Co. v. Johnson*, 264 U.S. 375 (1924). *See Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1244 (3d Cir. 1977), *cert. denied*, 434 U.S. 861 (1977); *Zych v. Unidentified, Wrecked and Abandoned Vessel*, 746 F. Supp. 1334, 1345-46 n.14 (N.D. Ill. 1990). *See also Palmore v. United States*, 411 U.S. 389 (1973).[2]

In *Panama Railway*, this Court held that there are two limits on Congress' power to alter admiralty law:

> One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provisions require that the enactments . . . shall be co-extensive with and operate uniformly in the whole of the United States.

Panama Ry. Co. v. Johnson, 264 U.S. at 375. *See also Hurst v. Triad Shipping Co.*, 554 F.2d at 1245 (". . . ban on congressional interference with jurisdiction can relate only to extreme tampering with the territorial or subject matter jurisdiction of admiralty and maritime courts"). The Tax Injunction Act does not approach these boundaries. By excluding from the district court's jurisdiction the power to interfere with the enforcement of state tax laws, it does not exclude a

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2 "[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Palmore v. United States*, 411 U.S. at 401 (quoting *Cary v. Curtis*, 3 How. 236, 245 (1845)).

thing clearly falling within admiralty jurisdiction. As stated above, admiralty courts traditionally lacked the power to issue equitable relief, let alone an injunction such as the one sought here. Thus, in terms of admiralty jurisdiction, the Tax Injunction Act does no more than codify traditional limits of admiralty jurisdiction.[3]

Nor does the Tax Injunction Act interfere with a uniform system of maritime law. The fact that each State separately licenses insurance brokers who procure marine insurance and imposes differing requirements or even taxes on the activities of those brokers does not violate the uniformity of maritime law. Brokers are not sea-goers; they are resident ashore, conduct their activities ashore, and thus are properly subject to local laws.

Petitioner argues that the Tax Injunction Act is inapplicable in cases where states levy a tax on foreign commerce. Petitioner misunderstands the Act. While constitutional objections may be raised to such taxes, these objections must be heard, as the district court below held, in state courts first. The plain language of the Tax Injunction Act admits of no exceptions, where, as here, the laws of the State afford a plain speedy and efficient remedy to the taxpayer.

As a final matter, this case is of little practical significance inasmuch as New York has amended the challenged tax, N.Y. Insurance Law § 9102(b)(1) (McKinney's Supp. 1991), so that resolution of the issues raised by petitioner will affect only those brokers who, like petitioner, are delinquent in taxes for periods prior to July 1, 1987. *See* Pet. at 22, 49.

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3 This is so even though in modern times, federal courts in admiralty cases may issue declaratory relief. *See New York State Waterways Ass'n v. Diamond*, 469 F.2d 419, 421 n.1 (2d Cir. 1972).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Dated: New York, New York
July 15, 1991

Respectfully submitted,

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